MALAYSIAN REPORTS

KOPERASI SERBAGUNA CUEPACS TANGGUNGAN BHD. v. CITY INVESTMENTS SDN. BHD.

[F.C. (Wan Suleiman, Seah & Mohamed Azmi F.JJ.) January 7 & February 26, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 117 of 1982]

Practice and Procedure – Interlocutory application – Application heard but not completed by Judge – Application heard afresh by another Judge – Jurisdiction – R.H.C. 1980, O. 35 r. 11.

In this case Ajaib Singh J. had issued an interlocutory injunction restraining the respondent from dealing with land. The respondents applied to set aside the injunction and the application was heard before Abdul Razak J. who reserved his decision. The learned Judge subsequently ordered the respondent to file a statement of accounts. The learned Judge then asked Wong Kim Fatt J.C. to complete the hearing. Wong Kim Fatt J.C. ordered the application to be heard *de novo* before him. At the hearing a preliminary objection was raised on the question of whether the learned Judicial Commissioner had any jurisdiction to proceed with the trial. The same point was raised at the commencement of the appeal before the Federal Court.

Held, Order 35 rule 11 of the Rules of the High Court does not apply to interlocutory proceedings and a judge has an absolute discretion to complete the hearing of any interlocutory matter and make an order or leave it to another judge to hear submissions *de novo* and make a decision thereon. The preliminary objection must therefore be overruled.

Cases referred to:

(1) *Chua Chee Chor* v. *Chua Kim Yong & Ors.* [1963] M.L.J. 17.
(2) *Clapham* v. *Oliver* 30 L.T. 365
(3) *Wozniak* v. *Wozniak* [1953] 1 All E.R. 1192.

FEDERAL COURT.

Saraswathy Devi for the appellants.

P. Cumaraswamy (*P.P. Royan* with him) for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): At the commencement of the appeal, counsel for the appellant raised this preliminary objection on the question of whether the learned Judicial Commissioner had any jurisdiction to proceed with the trial at all in view of what had transpired before.

This same point had been raised at the commencement of proceedings before the learned Judicial Commissioner as will appear from his judgment, the relevant part of which is set out hereunder:

"When the application came up for hearing before me on April 2, 1982 learned counsel for the Plaintiffs raised as preliminary objection that I had no jurisdiction to hear it on the ground that it was first heard by Abdul Razak J., who had not given his decision. Learned counsel for the defendants submitted that the Plaintiffs had filed fresh affidavits for hearing before me. He referred to Order 35, rule 11, of the Rules of the High Court, 1980, and submitted that the learned judge had not concluded the case, and that I had jurisdiction to hear the application.

The short answer to that objection is that upon his transfer from Seremban to Kuala Lumpur Abdul Razak J. had indicated through his Secretary, who had minuted the file accordingly, that he was unable to conclude the case. I had spoken to the learned judge personally on March 31, 1982 and he indicated that I should hear this application afresh. In my opinion this case falls within the scope of 'other cause' in Order 35, rule 11. Accordingly, I ordered the application to be heard *de novo* before me based on the affidavits filed in court."

Order 35 rule 11 reads as follows:

(1) When a Judge who has commenced a trial of any proceedings is unable through death, illness or other cause to conclude the trial, another Judge may with the consent of the parties deal with the evidence already recorded and proceed with the trial from the stage at which the previous Judge left it.

(2) Nothing herein shall prevent the Judge who continues the trial from recalling all or any of the witnesses or taking their evidence afresh."

S. Devi for the appellants says that the words "or other cause", which should be construed *ejusdem generis* do not cover the circumstances. In other words she is saying that Abdul Razak J. and not the learned Judicial Commissioner is the one who has jurisdiction to proceed.

A perusal of the High Court file discloses the following:

On 22.2.80, upon hearing a Summons-in-Chambers, Ajaib Singh J. issued an interlocutory injunction restraining the respondents from agreeing to sell, selling, transfering or in any way dealing with several pieces of land enumerated in the order until determination of the High Court Civil Suit No. 189 of 1980 or until further order of the court.

On 30.3.81, the respondents' application to set aside the injunction was heard before Abdul Razak J. and decision was reserved.

However, on 28.9.81 the same judge ordered the respondents to file within 3 months a statement of accounts, which were duly filed on 28.12.81.

It was at this stage that Abdul Razak J. requested Wong Kim Fatt J.C. to complete the hearing of the application to set aside the injunction.

We agree with Mr. Cumaraswamy that Abdul Razak J had not completed his hearing.

Our attention was also drawn to the decision in *Chua Chee Chor* v. *Chua Kim Yong & Ors.*[1]. This was an appeal from the decision of the Federation Court of Appeal ([1960] M.L.J. 127).

The plaintiffs (respondents in this appeal) were sons and widow of another son of one C, deceased and they claimed *inter alia* a bicycle shop in the defendant's (appellant's in this appeal) possession and 242 shares in the Trengganu Bus Co. Ltd. registered in the defendant's name as being part of the estate of the deceased. The defendant who was one of the sons of the deceased denied these claims. The trial before Abdul Hamid J. lasted for nine days after which the learned trial judge reserved judgment and he later retired before delivering judgment. The case was then heard by Neal J. and both parties made application that Neal J. should decide the case on the evidence as recorded by Abdul Hamid J. who had taken a full note. Neal J. was also provided with copies of the exhibits and the previous submissions of counsel. Neal J. acting under section 75 of the Trengganu Civil Procedure Code held that as the bicycle shop and the shares were specified in the letters of administration to the estate of the deceased, they were the property of the deceased. He further decided as a fact that the shop and the shares were the property of the deceased. On appeal to the Court of Appeal it was held that Neal J. had erred in law in holding that the matter was decided by the letters of administration. The Court of Appeal further by a majority affirmed the finding of fact by Neal J. Before the Judicial Committee of the Privy Council it was contended that (a) Neal J. had no jurisdiction to act as he did because section 75 of the Code did not cover a case where there were no depositions and therefore no recording of the evidence save in the judge's notes, and where a hearing was not being "continued" but had already been concluded save in so far as judgment remained to be delivered and (b) even if he had jurisdiction, the courses which he adopted was contrary to the principles of justice and the judgment should be set aside and a new trial ordered.

Held: (1) the evidence in this case had been "taken and recorded by a judge" within the meaning of section 75 of the Trengganu Civil Procedure Code, which applied alike to civil and criminal cases, and, further, the hearing was being "continued" before Neal J. who in fact, heard further submissions by counsel.

(2) while the course adopted by Neal J. considered *in vacuo* was plainly undesirable and a precedent not to be followed, the circumstances were very unusual, and the material before the Judge, although a very insecure foundation for disputed questions of fact, was that on which the parties had asked to have the case decided, and its inadequacy affected each party alike;

(3) the procedure which the defendant had requested, and of which he had made no complaint in the courts below, could not be regarded as a denial of justice.

We note that in *Chua's case* both parties had agreed that the trial (at which oral evidence was adduced) should proceed on the basis of the evidence recorded by the retired judge, so that it cannot apply on the facts of the present appeal where the appellant, at least does not consent, and where only submissions were made, and affidavits tendered were in evidence.

Mr. Cumaraswamy referred us to Vol. 3 of *Strouds* Judicial Dictionary, 4th Edn., page 1884 in support of his proposition that the word "other" in the rule should not be construed *ejusdem generis*, for "It would seem that the *ejusdem generis* rule of interpretation has but little, if any, value in statutes conferring discretionary powers on the judiciary or such like public functionaries. Thus, the power to remit to the county court actions for 'malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort,' in cases where the plaintiff had no visible means of paying costs (County Courts Act 1867 (c. 142), section 10), seems to have applied to all actions of tort without limitation (*Clapham* v. *Oliver.*[2])."

We do not think we need to decide if he is indeed correct in his surmise.

It would suffice if we were to say that in our view, the word "trial" in O. 35 r. 11 in connection with which there is "evidence already recorded", should be given the meaning given to it in another context, in *Wozniak* v. *Wozniak*[3] wherein Denning L.J. held that a trial means the final determination of the main suit and not determination of any interlocutory application therein.

In other words, Order 35 rule 11 does not apply to interlocutory proceedings and a judge has absolute discretion to complete the hearing of any interlocutory matter and make an order, or leave it to another judge to hear submissions *de novo* and make a decision thereon.

We therefore overrule the preliminary objection lodged by S. Devi.

Order accordingly.

Solicitors: *N. Saraswathy Devi; Shook Lin & Bok.*

PEMUNGUT HASIL TANAH, DAERAH BARAT DAYA, PULAU PINANG v. ONG GAIK KEE

[F.C. (Wan Suleiman, Salleh Abas & Abdul Hamid F.JJ.) August 16, 1982 & March 19, 1983]

[Ipoh – Federal Court Civil Appeal No. 271 of 1981]

Administrative Law – Land Acquisition – Delay in holding inquiry and making award – Injustice done to landowner – Whether acquisition done in accordance with the law – Whether application for certiorari can be made – Land Acquisition Act, 1960, ss. 8, 10 and 68 – Interpretation and General Clauses Ordinance, 1948, s. 38 – Federal Constitution, art. 13.

Constitutional Law – Rights of property – Land Acquisition – Delay in holding inquiry and making award – Federal Constitution, art. 13.

Land Law – Land Acquisition – Delay in holding inquiry and making award – Doctrine of exhaustion – Injustice done to landowner – Whether requisition done in accordance with law – Land Acquisition Act, 1960, ss. 8, 10 & 68 – Federal Constitution, art. 13.

In this case the Penang State Authority made a declaration on April 25, 1974 under section 8 of the Land Acquisition Act, 1960, for the acquisition of an area of land for a public purpose. By another *Gazette* Notification dated December 20, 1979 the State Authority made a declaration that an area of the said land together with some other lands was needed for a public purpose. An inquiry was held and compensation awarded for this land. On November 5, 1980 the Collector issued a notice that he would hold an inquiry in respect of the original piece of land. The inquiry was held despite the objection of the respondent and an award made. The respondent applied for an order of certiorari to quash the inquiry and the award. Mustapha Hussain J.C. allowed the respondent's application. He held that the doctrine of exhaustion of an earlier declaration by a subsequent one applied in this case and that there was injustice caused to the landowner by the delay in holding the inquiry under section 10 of the Act and the making of the award. The appellants appealed.

Held: (1) the doctrine of exhaustion is not applicable as both declarations were declarations under section 8 of the Land Acquisition Act, 1960;

(2) the constitutionality of the Land Acquisition Act is not in issue in this case and no challenge was made against the Act for not providing adequate compensation or in any way being contrary to Clause (2) of Article 13 of the Federal Constitution;

(3) the Collector's delay in holding the inquiry under section 10 of the Land Acquisition Act, 1960, seven years after the declaration of acquisition resulting in an inadequate compensation to the respondent brings the inquiry and the award outside the purview and scope of the Act. In view of the long delay resulting in injustice to the landowner, the acquisition was not done in accordance with the Act and the learned Judicial Commissioner was correct in ordering the issue of an order of *certiorari* to quash the acquisition proceedings.

Cases referred to:

(1) *State of Madhya Pradesh & Ors.* v. *Vishnu Prasad Sharma & Ors.* A.I.R. 1966 S.C. 1593.

(2) *Superintendent of Lands and Surveys, Fifth Division, Limbang* v. *Lim Teck Hoo & Anor.* [1980] 1 M.L.J. 58.

(3) *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

(4) *Reg.* v. *St. Albans Crown Court, ex parte Cinnamond* [1981] Q.B. 480.

(5) *Reg.* v. *Tottenham Justices, Ex parte Dwarkados Joshi* [1982] 1 W.L.R. 631.

(6) *Rex* v. *London County Council; Ex parte Swan and Edgar (1927) Ltd.* (1929) 141 L.T. 590.

FEDERAL COURT.

Mohamed Saari bin Yusof (Legal Adviser, Penang) for the appellants.

R. Rajasingam (*Balwant Singh* with him) for the respondent.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the Judgment of the Court read by Edgar Joseph Jr. J.) The issue involved in this appeal concerns the legality of the acquisition of a piece of land comprising Lot 532 in Mukim 12, South West District of Penang. The land is part of the estate of one